

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

CSX HOTELS, INC.,  
D/B/A THE GREENBRIER

and

Case No: 11-CA-19537

INTERNATIONAL UNION OF  
OPERATING ENGINEERS,  
LOCAL NO. 132, AFL-CIO

*Jasper C. Brown, Esq.*, for the General Counsel.

*James P. McHugh, Esq. (Barrett Chafin Lowry  
Amos & McHugh)*, of Charleston, West Virginia,  
for the Charging Party.

*Karl Terrell, Esq.*, of College Park, Georgia, and  
*Susan M. Kleisner, Esq.*, of White Sulphur  
Springs, West Virginia (*Stokes & Murphy, P.C.*),  
for Respondent.

DECISION

Findings of Fact and Conclusions of Law

Benjamin Schlesinger, Administrative Law Judge. The complaint<sup>1</sup> alleges that Respondent CSX Hotels, Inc., d/b/a The Greenbrier violated Section 8(a)(1) of the National Labor Relations Act by contacting the police department of the City of White Sulphur Springs<sup>2</sup> and attempting to interfere with lawful pickets on behalf of Charging Party International Union of Operating Engineers, Local No. 132, AFL-CIO (Union), engaged in protected activity on the public right of way. Respondent, while admitting the lawfulness of the protest, defends on the ground that it was in no way responsible for the actions of the police. I conclude that it was.

Respondent is a West Virginia corporation with a hotel and resort located in White Sulphur Springs, West Virginia, where it is engaged in providing food and lodging for guests. During the past 12 months ending November 27, 2002,<sup>3</sup> a representative period, Respondent purchased and received at its hotel and resort, goods and materials valued in excess of \$50,000 directly from points outside West Virginia. I conclude that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

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<sup>1</sup> This case was tried in Lewisburg, West Virginia on March 6, 2003. The charge was filed on June 21, 2002, and the complaint was issued on November 27, 2002.

<sup>2</sup> All police officers mentioned are members of the police department of White Sulphur Springs.

<sup>3</sup> All dates are in 2002, unless otherwise stated.

On June 12, the Union found out that Lynch Construction Company (Lynch), with whom it had a collective-bargaining agreement, was performing work on Respondent's premises that had been traditionally performed by operating engineers, using employees who were employees of Respondent, not Union members, and were being paid less than what its agreement provided.

5 On June 17, Union representatives confronted Lynch's president, who rebuffed their complaints and called Respondent's security personnel. Randy Thomas, Respondent's day shift supervisor of its security department, asked the Union representatives to leave Respondent's property. On Thursday, June 20, at about 6:40 or 6:45 a.m., the Union began picketing at the gate used by Lynch's employees, the 18-20 pickets carrying signs protesting Lynch's payments of  
10 substandard wages and commission of unfair labor practices. After 10 or 15 minutes of picketing, police officer Philip Wickline, told the pickets to move their cars, which were parked in a no-parking zone. The pickets complied.

15 Shortly after, Jack Damioli, Respondent's general manager, and Robert Wanko, its security director, appeared, Damioli advising the Union representatives that the entrance that they were picketing would not be used by Lynch. Either Damioli or Donald Huff, one of the Union representatives, suggested moving the pickets to the entrance that Lynch was using, based on Damioli's assurance that his facts were accurate and that Lynch would use only that entrance. The pickets moved. Damioli left, but Wanko remained. An hour later, police officers  
20 Emmett Sullivan and Jerry Smith told the pickets that their picketing violated a City ordinance requiring a permit for parades and public assemblies (they had a copy of the relevant section and gave it to Huff) and said that the pickets would have to leave. Huff protested that the pickets had the right to be there under the First Amendment of the United States Constitution and Section 7 of the Act and that the pickets were orderly and were not impeding egress and  
25 ingress. Sullivan threatened that, if the pickets did not leave, he would issue a citation. If they did not leave after he issued the citation, he would arrest the pickets, who would be taken to jail and could spend up to 30 days in jail, and that there could be up to a \$500 fine. As a result, the pickets left the area.

30 On Friday, the Union applied for a permit, but was advised that the required permit had to be approved five days in advance by the police chief, who was then out of town and would not return until the following week. The Union made the decision that obtaining a permit would unreasonably delay its efforts to protest what Lynch was doing and that the position of the police department was probably unenforceable; and so it recommenced picketing shortly after 6 a.m.  
35 on Monday, June 24. Police Chief James Hylton appeared, probably at about 7:30 a.m., and told Huff that he had been informed last week that he had to get a permit and had not obtained one. Huff protested that his attorney, James McHugh, had advised him that he did not have to get one. McHugh was there, and Hylton drove him back to police headquarters, where the Chief telephoned Mark Burnette, the city attorney, with whom he spoke and then McHugh spoke.  
40 Burnette told Chief Huff not to enforce the ordinance in this instance.

Respondent steadfastly maintained throughout the course of the six-hour hearing, and still does in its brief, that it had nothing to do with the action of the police. But its last witness, Chief Hylton, at the very last moment, shattered Respondent's defense. Hylton had been away  
45 from work the previous week and came in early on Monday morning, June 24, as he normally did, to catch up on what went on during his absence. There were Thomas and his assistant, Chuck Jones, who had come to his office, probably at about 7:20 a.m., to complain about the pickets being back. It was they who prompted the Chief to go to the picket line.

50 His testimony thus implicates Respondent, through two of Wanko's subordinates, in the police action, at least as of Monday morning, June 24. But his testimony also gives meaning to another bit of testimony of Officer Smith, who, after telling the pickets to leave on the prior

Thursday, went over to Wanko, and announced only; "[We advised them of the City Code and they're leaving and so are we." (Wanko did not deny that this was said, but merely could not recall it. He could admit only to "pass[ing] some social amenities.") Why Smith should have given Wanko that cryptic message was unexplained, especially why Smith should have thought that Wanko would understand what "City Code" he was talking about—unless Wanko had previously advised someone in the police department about the necessity for a parade and assemblage permit, about which Wanko knew for six years. The other alternative is that Smith had discussed the ordinance with Thomas and Jones and merely went to report to their superior the result of his conversation with the Union representatives, assuming that Wanko had knowledge of what his subordinates had been requesting. In either event, Respondent urged the police to do what they did.

All parties agree that the dispute here involved not Respondent, but Lynch and the Union. Yet Officer Smith went to Respondent to announce essentially that he was putting a stop to the demonstration. The fact is that, on Thursday, Wanko remained at the site for a substantial period of time, taking pictures of the Union's demonstration, and Thomas and Jones, his subordinates, were there, too. On Monday, both Thomas and Jones returned to the picket line at about the same time as Chief Hylton appeared, and Thomas stood next to the Chief when he was telling Huff that he had to have a permit. Neither testified to explain what they were doing at the police department on Monday morning and their involvement in this matter. Because they did not, I make an adverse inference that, assuming that Wanko did not participate in this incident the previous Thursday—and, because Officer Smith told him about the ordinance, there is ample reason for me to suspect, as I do, that Wanko did not tell the truth—clearly Thomas and Jones were involved, so that Officer Smith, confirming that he had done what had been asked of the department, told Respondent's principal representative.

There was additional proof of Respondent's involvement. Its counsel had been fully advised about the Union's protest. When the city attorney counseled the police not to become involved, Respondent's counsel telephoned him that morning and, failing to reach him, sent him a letter that day, by facsimile, seeking to persuade the City to enforce the ordinance requiring all picketing parties to obtain permits, adding: "We respectfully request the City to do its duty by enforcing the law and protecting the public's safety." No one explained the genesis of this letter, that is, who retained Respondent's counsel to write the letter and who provided counsel with the information to put in that letter. Even assuming that the letter was prepared and sent after the activity which is the subject of this proceeding occurred, the fact remains that Respondent was seeking the enforcement of a remedy which would stop the Union's picketing. Respondent's counsel did not testify, and I draw another adverse inference from the lack of testimony about the letter. In sum, I do not believe the protestations of Respondent and its witnesses. I find that Respondent was involved in the police action from its beginning.<sup>4</sup>

Respondent's brief states:

The Greenbrier does not dispute that Local 132 was peacefully and lawfully picketing in the right of way off Route 60 on June 20, 2002 and June 24, 2002. The Greenbrier does not dispute that the White Sulphur Springs police sought

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<sup>4</sup> By so finding, I do not credit fully Officer Wickline's testimony about his chance meeting with Wanko early in the morning of June 20. That conflicted with Wanko's testimony, which placed the meeting at least fifteen minutes earlier, before Wickline had ordered that the illegally parked cars be moved. It was then that Wanko suggested to Wickline, a relatively new policeman, that there was no permit for the picketing.

the removal of the picketers' vehicles and proceeded to enforce the local ordinance requiring picketers to obtain a permit.

With my findings of Respondent's involvement, the law is well settled. As the Board stated in *Bristol Farms, Inc.*, 311 NLRB 437, 437-438 (1993),

It is beyond question that an employer's exclusion of union representatives from public property violates Section 8(a)(1), so long as the union representatives are engaged in activity protected by Section 7 of the Act. See, e.g., *Gainesville Mfg. Co.*, 271 NLRB 1186 (1984). [Footnote omitted.]

Respondent does not question that the Union, by peacefully and lawfully picketing Lynch, to protest what the Union claimed to be contractual violations and unfair labor practices, was engaged in activity protected by Section 7. I find that it was. Because Respondent admits that the Union's pickets were on public property, it could not make a threshold showing of any property interest entitling it to exclude the pickets from that area. *Snyders of Hanover, Inc.*, 334 NLRB No. 21 (2001); *TNT Technologies Ltd.*, 330 NLRB 78, 78 fn. 3 (1999); *Food for Less*, 318 NLRB 646, 649 (1995), modified on other grounds 95 F.3d 733 (8th Cir. 1996); *Indio Grocery Outlet*, 323 NLRB 1138 (1997). Respondent's reliance on *Great American*, 322 NLRB 17 (1996), is misplaced. There was no showing that the Union's picketing was disturbing traffic or infringing on Respondent's private property interest of enabling its employees who were driving maintenance mowers to have unimpeded access to its property. I conclude that Respondent violated Section 8(a)(1) of the Act by contacting the police in order to seek the removal or arrest of the Union representatives who were engaged in lawful picketing.

#### Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, including my review of the briefs filed by Respondent and the Union and my observation of the witnesses as they testified, I issue the following recommended<sup>5</sup>

#### ORDER

Respondent CSX Hotels, Inc., d/b/a The Greenbrier, White Sulphur Springs, West Virginia, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Contacting the police department of the City of White Sulphur Springs, West Virginia, in order to seek the removal or arrest of representatives of International Union of Operating Engineers, Local No. 132, AFL-CIO (Union), who were engaged in lawful picketing and distribution of Union-related literature to employees on a public right of way.

<sup>5</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in White Sulphur Springs, West Virginia, copies of the attached notice marked "Appendix."<sup>6</sup> Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 20, 2000.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C. May 2, 2003

Benjamin Schlesinger  
Administrative Law Judge

<sup>6</sup> If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities

WE WILL NOT contact the police department of the City of White Sulphur Springs, West Virginia, in order to seek the removal or arrest of representatives of International Union of Operating Engineers, Local No. 132, AFL-CIO (Union), who were engaged in lawful picketing and distribution of Union-related literature to employees on a public right of way.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

CSX HOTELS, INC., D/B/A THE GREENBRIER

(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).

4035 University Parkway, Republic Square, Suite 200, Winston-Salem, NC 27106-3323

(336) 631-5201, Hours: 8 a.m. to 4:30 p.m.

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (336) 631-5244.